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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)
)
Amendment of the Commission's) WT Docket No. 96-6
Rules To Permit Flexible)
Offerings in the Commercial Mobile)
Radio Services)

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Comments of Motorola, Inc.

Pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415,
Motorola, Inc. ("Motorola") respectfully submits these comments in response to the
Further Notice of Proposed Rule Making adopted June 27, 1996, in the above-captioned
proceeding.¹

As discussed in detail below, Motorola urges the Commission to apply the same
regulatory and jurisdictional scheme to all services -- fixed, mobile, and any
combination thereof -- provided by commercial mobile radio service ("CMRS")
operators. In Motorola's view, consistent regulatory treatment of all services offered
by CMRS carriers is essential if the Commission truly intends to realize the substantial
benefits -- including increased competition in the provision of telecommunications
services and greater responsiveness to consumer demand -- that prompted the agency to

¹ Amendment of the Commission's Rules To Permit Flexible Offerings in the
Commercial Mobile Radio Services, 11 FCC Rcd 8965 (1996) (First Report and Order
and Further Notice of Proposed Rule Making) [hereinafter *First Report and Order and
Further Notice*].

permit CMRS licensees to offer fixed, mobile, and hybrid services on spectrum allocated for CMRS operations.

I. Background

In the *First Report and Order* portion of this proceeding, the Commission amended its rules to afford licensees "maximum flexibility to provide fixed or mobile services or combinations of the two over spectrum allocated for CMRS services, including PCS, cellular, and SMR services."² In accordance with the rule changes adopted in the *First Report and Order*, service providers using spectrum allocated for CMRS now have the flexibility to provide fixed services on a co-primary basis with mobile services, and may choose to provide fixed services exclusively, mobile services exclusively, or any combination or the two.³

Noting that the *First Report and Order* significantly broadened the potential scope of fixed services that may be offered by CMRS providers, the Commission solicited further comment on the regulatory treatment of fixed services that may not be considered ancillary, auxiliary, or incidental to mobile services, and issued the *Further Notice*.⁴ The Commission has proposed to address the regulatory treatment of such

² *Id.*, ¶ 22.

³ *Id.*, ¶ 24.

⁴ *Id.*, ¶ 48. The Commission expressly affirmed that ancillary, auxiliary, and incidental services offered by CMRS providers are mobile services and are subject to CMRS regulation. *Id.*

offerings on a case-by-case basis. Under the Commission's proposed procedure, it would establish a rebuttable presumption that any wireless service provided under a CMRS operator's license falls within the definition of CMRS and will be regulated as CMRS. Any interested party would be allowed to challenge the presumption regarding a particular service offered by a particular CMRS provider. If the challenger demonstrates that the service provider does not meet the definition of CMRS for that particular offering, the offering would not be regulated as CMRS.⁵ The Commission seeks comment on this approach as well as other alternative regulatory mechanisms.⁶

II. To Ensure That the Public Interest Benefits of Flexible CMRS Offerings Are Attained, the Commission Should Make Plain That Fixed Wireless Services Provided By CMRS Licensees Will Be Regulated in the Same Manner as Other CMRS Offerings.

As indicated in its comments filed in response to the original *Notice of Proposed Rule Making* in this proceeding, Motorola supports the Commission's decision to permit CMRS licensees to offer fixed wireless services.⁷ Motorola anticipates that allowing CMRS operators flexibility to provide fixed or mobile services, or any combination of the two, will serve the public interest in several significant respects, including: (1) increasing competition among wireless and local exchange service

⁵ *Id.*, ¶¶ 53-54.

⁶ *Id.*, ¶¶ 54-56.

⁷ Comments of Motorola, Inc., WT Docket No. 96-6, at 2-3 (filed March 4, 1996).

providers; (2) permitting CMRS licensees to offer a broader variety of services and service packages in response to the needs of users; (3) facilitating the effective delivery of communications services to rural areas; and (4) eliminating unnecessarily restrictive regulatory requirements.⁸

To ensure that these benefits are realized, it is essential that the Commission formulate rules and policies expressly providing that all services offered by CMRS carriers, including fixed applications, are subject to the same regulatory treatment. Without consistent, federal regulation of fixed, mobile, and integrated CMRS offerings, the public interest benefits the Commission hopes to attain by allowing flexible use of CMRS spectrum are unlikely to be achieved. The prospect of having to comply with the regulatory requirements of numerous different states, or with uncertain and potentially inconsistent federal rules, will act as a strong deterrent to the offering of fixed wireless services.

For this reason, Motorola does not support the Commission's proposal to establish only a rebuttable presumption that fixed services provided under a CMRS operator's license would be classified and regulated as CMRS. In Motorola's view, this approach will not afford CMRS licensees the regulatory certainty necessary to facilitate the offering of fixed wireless services or integrated fixed and mobile wireless applications.

⁸ *Id.* at 3-5.

Moreover, Motorola endorses the analysis of numerous other commenters who, in response to the original *Notice* in this proceeding, agreed that, under Section 332(c) of the Communications Act, the "inseparability doctrine," and the Telecommunications Act of 1996, the Commission has the authority to preempt state regulation of fixed CMRS applications in the same manner that the agency has preempted state regulation of mobile wireless offerings.

In particular, the primary purpose of Congress's 1993 amendments to the Communications Act was to foster the nationwide development of wireless telecommunications services through establishment of a uniform federal regulatory framework for all mobile services.⁹ To this end, Congress amended Section 2(b) of the Act, which historically denied the Commission jurisdiction over all aspects of intrastate telecommunications that are severable from the interstate portion or do not conflict with a Federal policy, to state that, "*[e]xcept as provided in sections 223 through 227 of this title, inclusive, and Section 332 of this title . . . , nothing in this chapter shall be construed to apply or to give the Commission jurisdiction [over intrastate telecommunications].*"¹⁰

⁹ See H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 260 (1993) (House Report) (explaining that the preemption provisions of Section 332 are intended to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."); see also H.R. Rep. No. 103-213, 103rd Cong., 1st Sess. 490 (1993) (Conference Report) (indicating that Congress intended to create a "federal regulatory framework governing the offering of all commercial mobile service[s]").

¹⁰ 47 U.S.C. § 152(b) (emphasis added).

The statutory scheme established in Section 332, as amended, and well settled case law grant the Commission authority to regulate all interstate and intrastate aspects of CMRS operations. Section 332(c)(3)(A) of the Act states that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service" ¹¹ By its plain language, this provision essentially vests the Commission with exclusive jurisdiction over the entry of and rates charged by all CMRS licensees. ¹² Although Section 332(c)(3)(A) permits states to regulate "other terms and conditions" of commercial mobile services, federal preemption of any state attempt to regulate the "other terms and conditions" of mobile or fixed CMRS applications is called for under the "inseparability doctrine." ¹³

¹¹ 47 U.S.C. § 332(c)(3)(A).

¹² Section 332(c)(3)(A) permits states to petition the FCC for authority to regulate rates of a commercial mobile service if (i) market conditions with respect to that service fail to protect subscribers adequately from unjust and unreasonable rates; or (ii) these market conditions exist and the service is a replacement for landline telephone exchange service for a substantial portion of the telephone landline exchange service within the state.

¹³ See *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370-76 (1986). The "inseparability doctrine" calls for federal preemption of state law in instances where it is "not possible to separate the interstate and the intrastate components" of an asserted federal regulation or where "compliance with both federal and state law is in effect physically impossible." *Id.* at 368, 375 n.4. See also *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1506 n.517 (1994) ("[I]f we determine that a State's regulation of other terms and conditions of jurisdictionally mixed services thwarts or impedes our federal policy of creating regulatory symmetry, we would have authority under *Louisiana PSC* to preempt such regulation.").

Furthermore, state regulation of fixed offerings provided by CMRS carriers is precluded by new Sections 253(a) and 253(d) of the Communications Act. Section 253(a) states that, "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."¹⁴ In accordance with Section 253(d), if the Commission determines that a state or local regulation violates Section 253(a), "the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary. . . ."¹⁵

In addition to the Commission's jurisdictional authority -- and obligation -- to regulate fixed CMRS offerings, the Communications Act expressly authorizes the FCC to regulate fixed CMRS services in the same manner as mobile CMRS offerings. Specifically, Section 332(d)(1) of the Act defines a "commercial mobile service" as "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public"¹⁶ Section 3(27) states that a "mobile service" includes "any service for which a license is required in a personal communications service established pursuant to the proceeding entitled Amendment of

¹⁴ 47 U.S.C. § 253(a).

¹⁵ 47 U.S.C. § 253(d).

¹⁶ 47 U.S.C. § 332(d)(1).

the Commission's Rules To Establish New Personal Communications Services, or any successor proceeding."¹⁷

Motorola agrees with several commenters who suggest that, under the plain language of these provisions, any service offered by a PCS licensee -- including a fixed service -- is to be classified as CMRS and subject to regulatory treatment as a CMRS offering.¹⁸ In turn, Congress's mandate that similar mobile services be subject to symmetrical regulatory requirements dictates that the fixed offerings of other CMRS providers be treated in a like fashion. Moreover, Section 3(27) gives the Commission substantial discretion to define "mobile services" to include fixed offerings.¹⁹ In view of the important public interest benefits to be gained through the consistent regulatory treatment of fixed and mobile wireless offerings, it is imperative that the Commission exercise its broad authority under these provisions and classify fixed applications provided by CMRS licensees as CMRS.

Should the Commission elect not to regulate fixed and mobile services provided by CMRS carriers as CMRS offerings, Motorola prefers several commenters' suggestion that the agency "regulate any fixed wireless service provided by a CMRS provider as CMRS until such time that the service constitutes a substitute for landline

¹⁷ 47 U.S.C. § 153(27) (quotation marks omitted).

¹⁸ See *First Report and Order and Further Notice*, ¶ 49 and n.112.

¹⁹ See *id.*, ¶ 50 and n.118.

telephone exchange service in a substantial portion of a state,"²⁰ over the proposed rebuttable presumption.

As indicated in the *Further Notice*, under this approach, any state seeking to regulate a fixed offering provided by a CMRS carrier would be required to file a petition under Section 332(c)(3) of the Communications Act, and the Commission would have to grant the petition, before the state would be allowed to regulate the CMRS provider's fixed wireless service.²¹ If and when petitions in accordance with Section 332(c)(3) are filed, the Commission would have to assess the need for federal or state regulation of fixed CMRS based on what may by then be very different marketplace circumstances.

This procedure is more consistent with Congress's intent that CMRS operations not be subject to state regulation unless there is no alternative means for subscribers to obtain basic telephone service.²² In addition, while Motorola prefers that the Commission regulate fixed and mobile services offered by CMRS carriers as CMRS

²⁰ *First Report and Order and Further Notice*, ¶ 56.

²¹ *Id.*

²² *See supra*, note 12. *See also* H.R. Rep. No. 103-213, 103rd Cong., 1st Sess. 490, 493 (1993) (Conference Report) ("[T]he Conferees intend that the Commission should permit States to regulate radio service provided for basic telephone service if subscribers have no alternative means of obtaining basic telephone service."); *see also* Petition of Arizona Corp. Comm'n, 10 FCC Rcd 7824, 7839 (1995) ("[W]here CMRS is the only available exchange telephone service, we construe Section 332(c)(3)(A)(ii) to mean that Congress' intent in promoting universal telephone service outweighs its interest in permitting the market for CMRS to develop in the first instance unfettered by regulation. . . .").

indefinitely, this approach would afford licensees greater regulatory certainty than the rebuttable presumption proposed in the *First Report and Order and Further Notice*.

III. Conclusion

For the reasons set forth above, Motorola strongly urges the Commission to adopt rules and policies making plain that all services offered by CMRS operators, including fixed services, mobile services, and any combination thereof, will be classified and governed in the same way. Formulation of consistent federal rules and policies governing all applications provided by CMRS carriers is essential if the Commission intends to achieve the important public interest benefits that prompted it to allow CMRS operators flexibility in the use of CMRS spectrum.

Respectfully submitted,

Motorola, Inc.

By:

Mary E. Brooner / HE

Mary E. Brooner

Manager, Wireless Regulatory Policies
Motorola, Inc.

1350 I Street, N.W., Suite 400

Washington, D.C. 20005

(202) 371-6900

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CERTIFICATE OF SERVICE

I, Robin Walker, hereby certify that on this 25th day of November, 1996, I caused a true copy of the foregoing "Comments of Motorola, Inc.," to be delivered to the following persons via hand delivery:

Mr. David Krech
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 7130
Washington, D.C. 20554

International Transcription Service
2100 M Street, N.W.
Room 140
Washington, D.C. 20554

A handwritten signature in cursive script that reads "Robin Walker".

Robin Walker